United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

AND

JOINT APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24373

MAYTRUDE JONES, Administratrix of
Estate of Alexander L. Jones, Deceased.
MAYTRUDE JONES,

Appellant

vs.

ROGERS MEMORIAL HOSPITAL,

Appellee

Appeal from the United States District
Court for the District of Columbia.

CLEMENT THEODORE COOPER
918 F Street, N.W.
Suite 300-302
Washington, D.C. 20004-

ATTORNEY FOR APPELLANT

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QUESTIONS PRESENTED

A. Whether, under a three year limitation of action statute a claim for damages under the Survival Statute is barred where the decedent undergoes surgery and continues under medical treatment for a period of five months after release from hospital confinement and shortly thereafter dies as a result of an internal condition caused during the performance of the operation ?

B. Whether the cause of action under the Survival Statute accrues at the time of discovery of the alleged wrongful or negligent act ?

This case has not been previously before this Court.

References to rulings none.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24373

MAYTRUDE JONES, Administratrix of
Estate of Alexander Jones, Dec.
MAYTRUDE JONES,

Appellant

vs.

ROGERS MEMORIAL HOSPITAL,

Appellee

Appeal from the United States District
Court for the District of Columbia.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant brought this action under Title 12 D. C. Code 101, 1967 edition, Survival Statute, seeking damages due to medical malpractice incurred during the course of an operation to relieve acute appendectomy. The Operation was performed on October 2, 1966. Appellant's decedent was discharged from the hospital on October 17, 1966. After discharge, decedent continued to maintain contact as an outpatient with the Appellee for purpose of receiving medical treatment. During this period, decedent did not return to his usual occupation, until April, 1967. On April 21, 1967, Appellant's decedent died.

Appellant filed this action on December 8, 1969 seeking damages under the Survival Statute. (J. A. # 1) Appellee, defendant below, filed an Answer denying the allegations in Appellant's complaint and subsequently filed a Motion seeking Dismissal of the action on ground that the Action was barred by the Statute of Limitations. (J. A. # 2 & 3) Appellant filed opposition thereto along with a Statement of Facts and Memorandum of points and authorities. (J. A. #4) The Motion was argued before the U. S. District Court and upon consideration thereof the Motion to dismiss was granted. (J. A. # 4 a.) Thereupon, Appellant filed Notice of Appeal to this Honorable Court. (J. A. #5) Having perfected her Appeal, Appellant submits this Brief in support of her contentions which are setforth hereinafter.

STATEMENT OF FACTS

On October 1, 1966, Appellant's decedent entered the Rogers Memorial Hospital as a paying patient for purposes of undergoing surgery for correction of abdominal problems, to wit, appendectomy. (J. A. #6) The operation was performed on October 2, 1966 and appellant's decedent was released from the hospital on October 17, 1966. Decedent could not return to his usual occupation during the months which followed and consequently convalesced from the date of his discharge from the hospital until March, 1967 during which time, decedent was under constant out-patient care at the hospital. In March, 1967, decedent was given medical authorization to return to his usual occupation at the Washington Terminal Company. On April 15, 1967 decedent became ill but continued to work for approximately one week thereafter. On April 21, 1967, plaintiff's

decedent died suddenly and was pronounced Dead On Arrival at the Providence Hospital. (J.A. #7).

According to the Appellee's Hospital Report, decedent had undergone an Operation known as (a) Appendectomy and, (b) Cholecystectomy, both performed on October 2, 1966.

At approximately 8:30 A.M., the Coroner examined decedent's body in the Emergency Room at Providence Hospital and thereafter confirmed the death. The body was thereafter transferred to the D.C. Morgue and again, some 3 1/2 hours later, the Coroner again examined the body presumably in preparation for Autopsy. The post mortem change in the body was such that the Coroner concluded that an autopsy could not be performed because of the following post mortem body changes " A tremendous amount of distention of the abdomen, soft tissue of the face, scrotal sac and penis had developed. Large fluid containing blebs had developed over the body surface. Collections of gas were present throughout the tissues over the entire body from the scalp to the soles of the feet." The coroner further concluded that decedent had suffered from gas gangrene caused by a bacteria of the Clostridium family. That the most logical cause of the infection was due to a rupture of an internal organ within the abdominal cavity since this organism lives in the intestinal tract. The fact that most of the pain had been in the lower left quadrant of the abdomen would seem to indicate that a diverticula of the colon had ruptured resulting in a peritonitis and blood stream spread of this organism to all portions of the body." (J.A. # 8).

Decedent became patently ill on or about April 15, 1967 and remained in that condition until April 21, 1967, when decedent passed. (J.A. #9) Appellant,

having been appointed as Administratrix of the Estate of her deceased husband, filed a Civil Action in the United States District Court seeking damages under the Survival Statute.

SUMMARY OF ARGUMENT

A claim for damages filed under the Survival Statute is not barred under a three year statute of limitation period where the decedent undergoes surgery and continues under medical treatment for a period of five months after release from hospital confinement and dies as a result of an internal condition caused during the performance of the operation.

A cause of action under the Survival Statute accrues at the time the alleged negligence which caused the injury is discovered and at the time of discharge from medical treatment whichever came first.

A militant enunciation of guidlines and rules of thumb are sorely needed in the area of medical malpractice legal problems for it is the patient who must suffer the worst defeat. The patient is usually under anesthetic at the time of the careless act and could not possibly have any method of discovering the negligence at the time it is committed. Further, even though medical acts amounting to negligence might be committed during the course of surgery, the negligence may not be harmful. Nonetheless, consider the negligence which causes harm some one, two, three or even five years later.

The Trial Court erred in granting Appellee's Motion to Dismiss on the ground that such action was barred by the Statute of limitation.

STATUTES INVOLVED

Title 12, D.C. Code 301. 1967 edition provides,

" Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues :

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....
7. .....
8. for which a limitation is not otherwise specially prescribed - 3 years. "

Title 12, D.C. Code 101, 1967 edition (Survival Statute) provides ,

" On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased. In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom. "

ARGUMENT

(I)

A CLAIM FOR DAMAGES FILED UNDER THE SURVIVAL STATUTE IS NOT BARRED UNDER A THREE YEAR STATUTE OF LIMITATION PERIOD WHERE THE DECEDENT UNDERGOES SURGERY AND THEREAFTER CONTINUES UNDER MEDICAL TREATMENT FOR A DESIGNATED PERIOD OF TIME AFTER RELEASE FROM HOSPITAL CONFINEMENT AND DIES AS A RESULT OF AN INTERNAL CONDITION CAUSED DURING THE PERFORMANCE OF THE OPERATION.

Appellant filed an original action seeking damages in the United States District Court under Title 12 D.C. Code 101, 1967 edition, known as the Survival of Rights Statute, under which action appellant sought to recover damages due to physical injuries sustained by her decedent during the course of an operation for abdominal complications. Under the Survival of Rights Statute, it is provided that ;

> " On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased. In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom. "

Section 101 must read in conjunction with 12 D.C. Code 301, 1967 edition which sets the period of limitation in personal injury actions as being three years. Appellant's decedent had entered the Appellee's Hospital on October 2, 1966 for purpose of undergoing surgery to relieve acute appendectomy. Decedent was discharged from the hospital on October 17, 1966 but continued under out-patient treatment from October 17, 1966 to April, 1967 when decedent returned to his usual occupation. On April 21, 1967 decedent expired from causes designated as Gas Gangrene due to rupture of the colon.

Appellant contending that the cause of action for personal injuries did not begin to run until April, 1967, when decedent was released from out-patient treatment status at the defendant's hospital, filed an action under the Survival Statute seeking damages.

The critical question to be decided then is when did the cause of action first accrue. The general rule in this jurisdiction has long been stated that a statute of limitation does not begin to run until the alleged injury is discovered, or by the exercise of ordinary diligence, a party could have discovered the injury. P. H. Sheehy Company v. Eastern I. & Mfg. Co., 44 App. D.C. 107 (1915). As our Court of Appeals rationalized in Sheehy, supra,

> " It cannot be said that a person should assert a right before he has knowledge of, or is chargeable with knowledge of, the same. He must have had such opportunity to ascertain his position as would be sufficient in the case of a man of ordinary intelligence and prudence under the circumstances of the case.
>
> He must be diligent in informing himself upon the true state of his affairs, culpable ignorance being offensive both in Equity and in Law. "

In the normal personal injury case where parties seek damages, it has been generally held in the District of Columbia that the cause of action for personal injury accrues, for limitation purposes, at the time of the injury. Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F. 2d 469 (1956) cert. denied Gichner Iron Works, Inc. v. Hanna 76 S. Ct, 1051, 351 U.S.-989. The Court in Hanna, supra rationalized that,

> " We cannot shorten the time the code allows by adding a provision that personal injury essential to the accrual of the cause of action must occur within the three years of negligence. " Foley v. Pittsburgh-Des Moines Co. 363 Pa. 1, 38-39, 68 A. 2d 517, 535 (1949); Fredericks v. Town of Dover, 125 N. J. L. 288, 15 A. 2d 784 (1940); Kitchener v. Williams, 171 Kansas 540, 236 P. 2d 64 (1951).

However, here, Appellant unfolds a critical set of acts which bring new dimensions to the problem involving a period of limitation. These new dimensions necessarily leads the Court into the highly sensitive area of medical malpractice. Realizing the difficult barriers which a party must hurl inorder to overcome the period of limitation problem in medical malpractice cases. Approximately Seventeen States have passed legislation specifically dealing with the problem. (1.) As far as could be ascertained, Congress has not legislated on periods of limitation involving medical malpractice cases and it would appear that there is a need for such legislation. In medical malpractice cases, the relationship between physician and patient is such that the patient holds the physician in the highest of confidence and at no time will doubt the sincerity, intergrity and professional competence of the physician. Consequently, where acts of negligence occur during the course of an operation, there is no possible way for the patient to learn that, internally, something is wrong with him - usually brought on by the negligent act of the operating physician. Such is the case here. Thus, would be equitable, just and wise to require a plaintiff, in a medical malpractice case, to file a civil action for damages within three years from the date the operation was performed? Appellant would think that such a rule works an undue hardship on parties plaintiffs similarly situated. Here, this Honorable Court has for review before it, a set of facts which reveal that a 61 year old male person entered a Hospital

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(1.) Those States having legislated on the problem are as follows : Alabama, Colorado, Connecticut, Kentucky, Maine, Michigan, Nebraska, Missouri, New Hampshire, Ohio, South Dakota, New York, North Dakota. See 39 Colorado University Law Review 452 to 456 on problem.

for an Appendectomy and Cholecystectomy. That the patient remained in the Hospital for several weeks after the operations and was released on October 17, 1966. Thereafter, patient could not return to his usual occupation and was required to conveslescent up to March, 1967. During the period of convelesence, patient continued to appear at the hospital for out-patient treatment. Thus, the relationship between patient and physician at the Hospital was a continuing one. On April 21, 1967, the patient dies form causes commonly known as gas gangrene. The Coroner's report explains that the logical cause of the infection causing the gas gangrene" was a rupture of an internal organ within the abdominal cavity since this organism lives in the Human intestinal tract." Medically, Clostridial Perfringens (the bacteria which causes gas gangrene) has been defined as a form of bacterii responsible for gas gangrene. The gas gangrene is the result of the multiplication in tissue of clostridial organisms capable of destroying muscles tissue. As the organism multiplies and destroys the tissue, they produce gas. Symptoms usually appear in a few days after injury. After the first sign is discharge of foul smelling pus and gas from the primary wound, followed by pain in the area and swelling and tightness of the skin around the wound. See Lawyers' Medical Cyclopedia Supplement. 30.24 pp. 478.18-19. Volume 4 Lawyers Medical Cyclopedia 145.

In light of the foergoing medico-factual pattern, the question arises - when would the statute of limitation begin to run ? Appellant contends that the Statute of Limitation did not begin to run until the injury was first discovered or on the date when the patient was finally discovered or on the date when the patient was finally released from out-patient treatment from the defendant hospital. Thus, the Three year statute of Limitation period began in March, 1967. The right of adion accrues only when injury is sustained by the plaintiff and not when the

causes are set in motion which ultimately produce the injury as a consequence. Foley v. Pittsburgh-Des Moines Co., supra. However, appellant urges this Honorable Court to extend the rule one step further. The extension would embrace the rule of Discovery.

The New York Statute sets the period of limitation in medical malpractice cases as two years. N.Y. Civ. Prac. #50 (1) (1941) (two years). In New York the Courts were quick to realize the harshness of the period of limitation and through judical rule making, extended the rule to cover cases where the injury could not have been ascertained by the patient. The leading case representing the harshness of the New York rule is Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st dept.), aff. mem. 254 N.Y. 620, 173 N.E. 892 (1930). In Draper, supra, a physician, while operating upon the plaintiff for a appendicitis on May 27, 1925, closed the incision leaving a pair of forceps behind. After 2 years, during which time, plaintiff experienced symptoms of ill health, an x-ray was taken by another physician which disclosed the presence of the forceps. The next day, July 13, 1927, a second operation was performed and the forceps removed. Plaintiff then brought her cause of action on July 5, 1929 within 2 years after the discovery of the forceps, but not within two years after the operation by the physician. The Appellate Division granted Defendants Motion to Dismiss on ground that the action was barred by the two year statute of limitation. Plaintiff contended that the period of limitation did not begin to run until the date of discovery of the malpractice but the court rejected plaintiff's argument. See Note: 15 Minn. L. Rev. 245 (1931). The courts realizing the harshness of the rule, have made attempts in recent years to circumvent the rule. Thus, the New York Courts have now injected a new approach in statutiry interpretation inorder to ease the harshness of the

for an Apperdectomy and Cholecystectomy. That the patient remained in the Hospital for several weeks after the operations and was released on October 17, 1966. Thereafter, patient could not return to his usual occupation and was required to conveslescent up to March, 1967. During the period of convelesence, patient continued to appear at the hospital for out-patient treatment. Thus, the relationship between patient and physician at the Hospital was a continuing one. On April 21, 1967, the patient dies form causes commonly known as gas gangrene. The Coroner's report explains that the logical cause of the infection causing the gas gangrene" was a rupture of an internal organ within the abdominal cavity since this organism lives in the Human intestinal tract." Medically, Clostridial Perfringens (the bacteria which causes gas gangrene) has been defined as a form of bacterii responsible for gas gangrene. The gas gangrene is the result of the multiplication in tissue of clostridial organisms capable of destroying muscles tissue. As the organism multiplies and destroys the tissue, they produce gas. Symptoms usually appear in a few days after injury. After the first sign is discharge of foul smelling pus and gas from the primary wound, followed by pain in the area and swelling and tightness of the skin around the wound. See Lawyers' Medical Cyclopedia Supplement. 30.24 pp. 478.18-19. Volume 4 Lawyers Medical Cyclopedia 145.

In light of the foergoing medico-factual pattern, the question arises - when would the statute of limitation begin to run ? Appellant contends that the Statute of Limitation did not begin to run until the injury was first discovered or on the date when the patient was finally discovered or on the date when the patient was finally released from out-patient treatment from the defendant hospital. Thus, the Three year statute of Limitation period began in March, 1967. The right of action accrues only when injury is sustained by the plaintiff and not when the

statute. One approach has been the adoption of the "Continuous Treatment Theory", that is, the Statute does not begin to run until the end of medical treatment. See Sly v. Van Lengen, 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. Onondaga County, 1923); see also 37 Harv. L. Rev. 272 (1923). In Sly, supra, the New York Court looked to the Laws of Ohio and followed the Ohio Court's decision in Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902 In Gillette, supra, the Ohio Court held, as early as 1902 that the Limitation did not begin to run against plaintiff's right to maintain the action until the case had been abandoned by the defendant or the professional relationship has terminated. Another legal technique used by the New York Courts was the adaption of the Contract - Action theory, that is, the physician -patient relationship being a contracfual one, a physician's negligence may constitute a breach of contract. The latter theory was found to be weak however, due to problems in pleading a cause of action Ex-contractu.

Appellant strongly urges this Honorable Court to continue to follow the Rule of Discovery which this Honorable Court enunciated as early as 1915 in P.H. Sheehy Company, supra. While the Court did not specify application of the Rule of Discovery to medical malpractice cases, the Court, in broad and general vein, setforth the principle which clearly had application in medical malpractice cases. It is more fitting to recognize that States began to follow the District of Columbia Rule in Sheehy, supra, and thereafter legislated the problem to resolve. Some Federal Courts have now begun to follow the Rule of Discovery. The Fifth Circuit Court of Appeals, expressly addressing itself to the question of limitation of actions in medical malpractice cases under the Federal Tort Claims Action held that,

> " Where a malpractice action was brought against the United States under the Federal Tort Claims Act based upon the treatment of plaintiff's wife at an Air Force Base Hospital by government employees, the action could be maintained within two years after the claimant discovered or in the exervise of reasonable diligence should have discovered the existence of acts of malpractice upon which the claim was based. Quinton v. United States, 304 F. 2d 234 (1962).

More fittingly, Appellant cites the reasoning of the Minnesota Court in grounding it's decision in a medical malpractice case via physician - patient relationship as another sound basis upon which Appellee here may be held subject to suit notwithstanding the limitation of actions period specified by the District of Columbia Code. Under the Minnesota rule, so long as the relationship of physician and patient continues as to a particular condition the physician was employed to cure, and the physician continues to attend and treat the patient in relation thereto and there is something more to be done by the physician in order to effect cure, the operation of the statute of limitation is suspended. See Couillard v. Charles T. Miller Hospital, Inc., 253 Minn. 418, 92 N. W. 2d 96 (1958).

As an alternative remedy in applying the physician-patient relationship as the point at which the statute begins to run, the facts here are clearly applicable. To recapitulate - decedent had entered the hospital for an operation in October, 1966 and was released on October 17, 1966. Decedent continued to appear at the Hospital on an Out-Patient Basis for treatment and was finally released and authorized to return to his usual occupation in March, 1967. The date of release from Out-Patient Treatment was the termination date of the physician-patient relationship and thus, the period of limitation did not begin to run until then.

Accordingly, the claim for damages filed under the Survival Statute is not barred under the three year statute of limitation period where decedent had undergone surgery and thereafter continued medical treatment for a designated period of time after release from confinement and died as a result of an internal condition caused during the performance of the operation.

(B)

A CAUSE OF ACTION UNDER THE SURVIVAL STATUTE ACCRUES AT THE TIME THE ALLEGED NEGLIGENCE IS DISCOVERED OR AT THE TIME OF DISCHARGE FROM MEDICAL TREATMENT

Under 12 D.C. Code 301, 1967 edition it is provided that,

" Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues :

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....
7. .....
8. for which a limitation is not otherwise specifically prescribed - 3 years. "

Section 301 must be read in light of 12 D.C. Code 101, 1967 edition which gives the legal representative of the deceased the right to bring an

action for damages due to personal injuries on behalf of the decedent. Historically, Statute of Limitations are statutes of repose. Poole v. Terminix Co. of Md. & Wash., 91 U.S. App. D.C. 287, 200 F. 2d 746 (1953); Talbott v. Hill, 49 App. D.C. 96, 261 F. 244 (1920); Strong v. Andros, 34 App. D.C. 278, 19 Ann. Cas. 101) (1910); Hall v. District of Columbia, 47 App. D.C. 552 (1918). The purpose of the statute of limitation is to prevent the revival and enforcement of stale demands against which it may be difficult to defend, because of lapse of time, fading memory, and possible loss of documents or evidence. Munter v. Lankford, 127 F. Supp. 630; aff. 98 U.S. App, D.C. 116, 232 F. 2d 373 (D.C.D. C., 1955); Poole v. Terminix Co. of Md. & Wash., supra The Statute of Limitation for the District of Columbia will be found in the Acts of Maryland A.D. 1715, Ch. 23, Section 2. In reading the limitation of actions statute for the District of Columbia, the language in the statute generally "limits the right to bring an action after the expiration of the period of three years from the time the right to maintain the action accrues.

Under Physician-Patient relationship Theory, the cause of action herein did not first accrue until March, 1967 when decedent was released from out patient treatment at the hospital. Further, under the Rule of Discovery Theory, the cause of action herein did not first accrue until March, 1967 when the injury resulting from the negligent acts by the Hospital was first discovered.

C O N C L U S I O N

In view of the points and authorities and the arguments advanced the conclusion is inescapable that the cause of action herein did not accrue until the alleged negligence had been discovered or at the time of discharge from medical treatment.

Accordingly, the Trial Court erred in granting Summary Judgment to Appellee.

Respectfully Submitted

s/ Clement Theodore Cooper
CLEMENT THEODORE COOPER
918 F Street, N.W. (300-302)
Washington, D.C. 20004

ATTORNEY FOR APPELLANT

JOINT APPENDIX

INDEX

J.A. #1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES
Administratrix of Estate of
ALEXANDER L. JONES, dec.
6703 Sandy Spring Road, N.W.
Washington, D.C.

&

MAYTRUDE JONES
6703 Sandy Spring Road, N.W.
Washington, D.C.

Plaintiffs

vs.

ROGERS MEMORIAL HOSPITAL
a corporation
8th & Massachusetts Avenue, N.E.
Washington, D.C.

Defendant

Civil Action No. 3467-69

COMPLAINT FOR DAMAGES DUE TO
NEGLIGENCE — MEDICAL MALPRACTICE
(SURVIVAL STATUTE)
(PERSONAL INJURY)

Count I

1. This action is brought under Title 12, D.C. Code 101, 1967 edition Survival Action. Plaintiff is an adult citizen of the United States and is a resident of the District of Columbia. Defendant is a corporation duly organized under the laws of the District of Columbia and does business therein. The amount in controversy exceeds the sum of $10,000 exclusive of interests and costs and the jurisdiction of the Court is thereby invoked.

2. Plaintiff 1 is the surviving wife, sole heir at law and next of kin of plaintiff's decedent who died on April 21, 1967. On or about the 18th day of September, 1967, plaintiff 1 was appointed Administratrix and personal representative of the Estate of Plaintiff's decedent and said letters of Administration

were issued to her by the U. S. District Court, holding a Probate Court under Administration Number . _____ .

3. At all times hereinmentioned the Defendant maintained and operated a hospital known as the Rogers Memorial Hospital in the District of Columbia for the treatment of injured and sick persons.

4. In October, 1966 for stipulated compensation to be paid to the defendant Rogers Memorial Hospital, by plaintiff, plaintiff was admitted as a paying patient for purpose of undergoing surgery for gallbladder and appendix trouble.

5. On or about October, 1966 plaintiff's decedent was placed under surge at Defendant's Hospital and as a direct result of the negligence of the defendant and its agents, servants and employees while acting within the scope of their employment, and during the course of said surgery, and the periods which followed thereafter, plaintiff's decedent was caused to suffer great pain, agony and infection and further, that during the course of said surgery and due to the negligence of the defendant, its agents, servants and employees, plaintiff was caused to suffer from rupture of an internal organ within the abdominal cavity, towit, the diverticula of the colon which subsequently caused gas gangrene from which plaintiff's decedent met his death on April 21, 1967.

6. As a result of the negligence of the defendants, plaintiff was caused to suffer, excruciating body pains and agony and was incapacited for seven months up to the date of his death.

7. That the deceased left surviving him this plaintiff, his widow who was dependent upon him for support and who prior to his death was being supported by him in the manner befitting the wife of a person of decedent's

means. At the time of his death the decedent was 61 years of age and was earning approximately $600.00 per month and decedent would have, in the future, accumulated a substantial estate for his wife had he not died.

8. Decedent was in no way contributorily negligent and that decedent's injuries were caused solely through the negligence of the defendant.

WHEREFORE, Plaintiff prays judgment against the defendant in the amount of $75,000.00.

Count II

9. Plaintiff 2 repeats each and every allegation contained in paragraphs numbered 1 through 8 of Count I, inclusively, with the same force and effect as though they were herein specifically set forth in detail.

10. Plaintiff 2 has expended the reasonable and necessary sum of $1,100 for the funeral expenses and burial of the decedent of undertaker's charge; $300.00 for preparation of grave; florists charge of $100.00; payment of minister of approximately $25.00. Further, as a direct result of the defendant's negligence as hereinbefore alleged, the decedent was compelled to and did expend and did become obligated to pay large sums of money for medicines, medical and surgical treatment and nursing between the time of his injury and the date of his death totaling approximately $15,000.00. In addition to the foregoing damages incurred, plaintiff 2 has sustained and will sustain loss of support totaling approximately $30,000.

WHEREFORE, Plaintiff 2 prays judgment against the defendant in the amount of $50,000.00.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N.W. (302)
Washington, D.C. 20004

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES!

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

D.A. 42

MAYTRUDE JONES, Administratrix of Estate of ALEXANDER L. JONES
Deceased
6703 Sandy Spring Road, N.W.
Washington, D.C.
and
MAYTRUDE JONES
6703 Sandy Spring Road, N.W.
Washington, D.C.

Plaintiffs

v.

ROGERS MEMORIAL HOSPITAL
A Corporation
8th and Massachusetts Ave., N.E.
Washington, D.C.

Defendant

Civil Action No. 3467-69

MOTION TO DISMISS

Defendant, Rogers Memorial Hospital, moves the court to dismiss the above entitled action because the complaint fails to state a claim against defendant upon which relief may be granted, in that the alleged right of action is barred by the applicable statute of limitations, D. C. Code Title 12, Section 301. In support of this motion, said defendant respectfully refers to its memorandum of points and authorities attached hereto, and made a part hereof.

CARR, BONNER, O'CONNELL,
KAPLAN & SCOTT

By_____
Lawrence E. Carr, Jr.
Attorney for Defendant
1001 Connecticut Avenue, N.W.
Washington, D.C.

LAW OFFICES
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NNECTICUT AVENUE
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES, et al :

Plaintiff :

v. : Civil Action No. 3467-69

ROGERS MEMORIAL HOSPITAL :

Defendant :

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

FACTS

Plaintiffs decedent was allegedly "caused to suffer great pain [and] agony and. . .rupture of an internal organ" due to the "negligence of defendant, its agents, servants and employees" occurring when plaintiff underwent surgery at defendant's hospital "On or about October, 1966." Complaint, Paragraph 5 (emphasis added).

According to the Complaint "this action is brought under Title 12, D.C. 101, 1967 edition," Complaint, Paragraph 1, which provides, in pertinent part, that

> "On the death of a person in whose favor. . . a right of action has accrued for any cause prior to his death, the right of action survives. . . ."

D.C. Code Title 12, Section 101 (emphasis added).

ARGUMENT

PLAINTIFF'S SURVIVOR ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

On the face of this complaint the negligence alleged to have been committed by defendant

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and attached Memorandum of Points and Authorities was mailed, postage prepaid, on the ___ day of January, 1970, to Clement T. Cooper, Esquire, attorney for Plaintiff, 918 F Street, N.W., Washington, D.C.

Lawrence E. Carr, Jr.

LAW OFFICES
ONNER, O'CONNELL,
PLAN & SCOTT
NNECTICUT AVENUE
GTON D. C. 20036

659-4660

decedent's surgery and treatment at defendant hospital "On or about October, 1966." Complaint, Paragraph 5. Under the applicable statute of limitations, D. C. Code Title 12, Section 301, such action was barred unless commenced within three years following its accrual which, on the face of this complaint, must have occurred on or before October 31, 1966. Thus, the statute of limitations expired as to plaintiff's survival action on or about October 31, 1969 and the complaint herein was filed on December 9, 1969.

Accordingly, defendant submits that Plaintiff's claim is barred by the statute of limitations.

CARR, BONNER, O'CONNELL,
KAPLAN & SCOTT

By_____
Lawrence E. Carr, Jr.
Attorney for Defendant
1001 Connecticut Avenue, N.W.
Washington, D.C.

D.C. #3

UNITED STATES DISTRICT COURT FOR THE DISTRICT

MAYTRUDE JONES, Administratrix of Estate of ALEXANDER L. JONES Deceased
and
MAYTRUDE JONES

Plaintiffs

v.

ROGERS MEMORIAL HOSPITAL

Defendant

Civil Action No. 3467-69

SUPPLEMENTAL MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Facts

The operative allegations of plaintiff's complaint relevant to defendant's liability are as follows:

> "4. In October, 1966 for stipulated compensation to be paid to the defendant. . . plaintiff was admitted as a paying patient for purpose (sic) of undergoing surgery for gall bladder and appendix trouble.
>
> "5. On or about October, 1966 (sic) plaintiff's decedent was placed under surgery at Defendant's Hospital and as a direct result of the negligence of defendant. . . plaintiff was caused to suffer rupture of an internal organ within the abdominal cavity, to with(sic) the diverticula of the colon which subsequently caused gas gangrene from which plaintiff's decedent met his death on April 21, 1967.
>
> "6. As a result of the negligence of the defendants, plaintiff was caused to suffer, excruciating body pains, and agony and was incapacitated for seven months up to date of his death."

Defendant Rogers Memorial Hospital has moved to dismiss the action on the ground that it is barred by the statute of limitations applicable to survival actions, D.C. Code §12-301.

LAW OFFICES
BONNER, O'CONNELL,
KAPLAN & SCOTT
CONNECTICUT AVENUE
NGTON D. C. 20036
659-4600

Plaintiff opposes the motion claiming that "plaintiffs decedent became patently aware of his illness on April 15, 1967, notwithstanding the date of the Operations (sic) as October, 1966." Memorandum of Points and Authorities, p. 1, and further that "(p)laintiff's decedent would have had no way of knowing what his medical defect was particularly when plaintiff's decedent continued to return to the Out-Patient Clinic at the hospital. . . [and] [t]he defendant knew what plaintiff's decedent (sic) condition was but plaintiff's decedent did not know." Id.

Defendant submits this Supplemental Memorandum in support of its Motion to discuss in an effort to clarify the issues raised by plaintiff's Opposition.

Argument

Plaintiff's action is barred by the statute of limitations.

Assuming, for the purposes of this motion, the truth of the material facts well-pleaded in plaintiff's complaint, O'Hair v. United States, 281 F.Supp. 815 (D.D.C. 1968), and ignoring plaintiff's extraneous contention, raised for the first time in her opposition, that defendant fraudulently concealed the facts of plaintiff's decedent's illness from him, see, Park-In-Theatres, Inc. v. Paramount-Richards Theatres, Inc., 7 F.R.D. 723 (D. Del 1948), plaintiff fails to state a claim upon which relief can be granted inasmuch as the instant action was not commenced within three years of the accrual of the cause of action. D.C. Code §12-301. As plaintiff correctly notes, in

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659-4660

cause of action first accrue. . . on the date of the surgery or . . . when plaintiff's decedent first learned of his fatal medical disability." Plaintiff's Opposition, p. 1.

The great weight of authority in the District of Columbia is that, absent fraudulent concealment of the facts giving rise to a cause of action, an action sounding in negligence accrues when the injury complained of actually results from the negligence alleged. Hanna v. Fletcher, 97 U.S.App.D.C. 310, 313 213 F.2d 469, 472, cert. den. 351 U.S.989 (1956); Poole v. Terminix Co. 91 U.S.App.D.C. 287, 288, 200 F.2d 746, 747 (1952).

From the allegations of plaintiff's complaint it is clear that the injury complained of was "a direct result of the negligence of defendant. . . during the course of said surgery (by which) plaintiff was caused to suffer from rupture of an internal organ. . . which caused his death." Complaint, paragraph 5. Thus, on plaintiff's own allegations, the injury occurred sometime in October (no exact date is specified) of 1966, and the statute of limitations commenced running on or about the date of the surgery causing that injury. This conclusion is further bolstered by plaintiff's own allegation that her decedent, as a result of the operation, was "caused to suffer. . . pains, and . . .was incapacitated for seven months up to the date of his death." Complaint, paragraph 6.

Finally, since plaintiff's complaint contains no factual allegation that defendant fraudulently concealed the facts of plaintiff's decedent's injuries from him, even if that allegation were true plaintiff may not go outside the record to

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GTON D. C. 20036
659-4660

invoke such fraudulent concealment to prevent the running of the statute of limitations. See, Park-In-Theatres, Inc. v. Paramount-Richards Theatres, Inc., supra.

Since no question of fraudulent concealment is present, the statute of limitations in this action began to run on the date of the injury to the plaintiff--in this case the date of the alleged negligent surgery.[1]

CARR, BONNER, O'CONNELL,
KAPLAN & SCOTT

By_____
Lawrence E. Carr, Jr.
Attorney for Defendant
1001 Connecticut Avenue, N.W.
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum of Law was mailed, postage prepaid, on the ____ day of January, 1970, to Clement T. Cooper, Esquire, attorney for plaintiff, 918 F Street, N.W., Washington, D.C.

_____
Lawrence E. Carr, Jr.

[1] The instant case is clearly distinguishable on its facts from Burke v. Washington Hospital Center, 293 F. Supp. 1328, (D.D.C. 1968), a recent case holding that the statute did not begin to run as to a "discovered" injury until such time as plaintiff knew or through the exercise of reasonable diligence should have known of the injury. Even so, it is clear that plaintiff's decedent knew or should have known of the facts giving rise to the instant cause of action well in advance of his death almost seven months later.

3.1967

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES, Administratrix
of Estate of ALEXANDER L. JONES
Deceased
6703 Sandy Srping Road, N.W.
Washington, D.C.

&

MAYTRUDE JONES
6703 Sandy Spring Road, N.W.
Washington, D.C.

Plaintiffs

vs.

ROGERS MEMORIAL HOSPITAL
a corporation
8th & Massachusetts Avenue, N.E.
Washington, D.C.

Defendant

Civil Action No. 3467-69

OPPOSITION TO MOTION TO DISMISS

Plaintiff Opposes Defendant's Motion to Dismiss for the stated reason that the action is one filed under the Survival Statute for the District of Columbia and that the action was timely filed, that is, within a period of three years from the date on which the cause of action first accrued. Here the cause of action first accrued when the plaintiff's decedent became violently ill and subsequently died from such illness. Here, plaintiff's decedent did not become aware of the cause of action until April 2, 1967 when he became violently ill and could not return to work. Plaintiff's decedent died in April, 1967.

For such other and further reasons as will be argued during the hearing of this Motion.

WHEREFORE, Plaintiff prays that the Motion be denied.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N.W. (302)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES, Administratrix
of Estate of ALEXANDER L. JONES,
Deceased.
6703 Sandy Spring Road, N.W.
Washington, D.C.

&

MAYTRUDE JONES
6703 Sandy Spring Road, N.W.
Washington, D.C.

Plaintiffs

vs.

Civil Action No. 3467-69

ROGERS MEMORIAL HOSPITAL
corporation
8th & Massachusetts Avenue, N.E.
Washington, D.C.

Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's complaint specifically states that the Action filed was one brought under 12 D.C. Code 301, Survival Statute. See Paragraph 1 complaint the record herein. Defendant's Motion to Dismiss on grounds of Limitation of Action is based upon allegations in plaintiff's complaint wherein plaintiff merely recited the initial date of contact with the defendant hospital as October, 1966. Nonetheless, plaintiff has receited in her statement of facts filed herein that the plaintiff's decedent became patently aware of his illness on April 15, 1967, notwithstanding the date of the Operations as October, 1966. Plaintiff's decedent would have had no way of knowing what his medical defect was particularly when plaintiff's decedent continued to return to the Out Patient Clinic at the hospital from October 17, 1966 to March, 1967. The defendant knew what plaintiff's decedent condition was but the plaintiff's decedent did not know.

Under 12 D.C. Code 301 (8) the period of limitation within which a Survival Action may be brought is three years. In this Jurisdiction and under our Survival Action, if a person injured dies, his right of action survives in favor of his legal representative. However, the question here is simply when did plaintiff's cause of action first accrue ? Did the cause of action accrue on the date of surgery or did the cause of action first accrue on April 15, 1967 when plaintiff's decedent first learned of his fatal medical disability, which, incidentality the defendant could have possibly corrected up to the date when plaintiff's decedent was last seen at the Defendant's Hospital as a Out Patient to wit, March, 1967. By this action, the defendant is now estopped from asserting the Statute of Limitations as a defense. Had plaintiff's decedent known the nature and extent of his malady and the malpractice, plaintiff's decedent could have filed his cause of action shortly after the Operation. By the overwhelming weight of authority, plaintiff may assert the doctrine of estoppel in pais to prevent an inequitable resort to a statute as a defense to barr plaintiff's cause of action. See McCloskey & Co. v. Kickinson (1947, Mun. Ct. App. DC) 56 A. 2d 442 (Note : The Federal Court is bound to follow the Highest Court of the District of Columbia as to it's interpretation of substantive of adjuctive law.) See also, Scarborought v. Atlantic Coast L.R. Co. (1949 CA 4th Va.) 178 F. 2d 253. See also, 132 A. L.R. 292 and 67 A. L.R. 1070.

Clearly the injury did not become patent until April 15, 1967 even though the negligence (malpractice) occurred at the time of the Operation on October 2, 1966. A cause of action does not accrue at the time of the Operation which results from the negligence of the defendants. See Poole v. Terminix Co., 91 U.S. App. D.C. 287, 200 F. 2d 746. Defendant cannot, by this Motion

request this Honorable Court to shorten the time within which Congress has designated as the period of limitation. Forley v. Pittsburgh-Des Moines Co. 363 Pa. 1, 68 A. 2d 517, 535; Fredericks v. Town of Dover, 125 N. J. L. 288, 15 A. 2d 784; Federal Reserve Bank of Atlanta Trust Co., for use of American Surety Co. of New York v. Atlanta Trust Co., 5 Cir., 91 F. 2d 283, 117 A. L. R. 1160; Hanna v. Fletcher 97 U. S. App. D. C. 310.

Accordingly, the cause of action accrued on April 15, 1967, at least and if not later, - this action having been filed within the three year period of limitation as prescribed by 12 D. C. Code 301, the defendant's Motion to Dismiss should be denied.

Clement Theodore Cooper
Attorney for Plaintiff
918 F Street, N. W. (302)
Washington, D. C. 20004

CERTIFICATE OF SERVICE

Copy of the foregoing mailed, postage prepaid to Law Offices, Lawrence E. Carr, Jr., Esquire, 1001 Connecticut Avenue, N. W., Washington, D. C. 20036, this 16th day of January, 1970.

Clement Theodore Cooper
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES, Administratrix
of Estate of ALEXANDER L. JONES,
Deceased.
6703 Sandy Spring Road, N.W.
Washington, D.C.

&

MAYTRUDE JONES
6703 Sandy Spring Road, N.W.
Washington, D.C.

Plaintiff

vs.

ROGERS MEMORIAL HOSPITAL
a corporation
8th & Massachusetts Avenue, N.E.
Washington, D.C.

Defendant

Civil Action No. 3467—69

PLAINTIFF'S STATEMENT OF FACTS

On October 1, 1966, plaintiff's decedent entered the Rogers Memorial Hospital as a paying patient for purposes of undergoing surgery for correction of abdominal obstructions. (The Operation was performed on October 3, 1966 and plaintiff's decedent was released from Rogers Memorial Hospital on October 17, 1966. Plaintiff's decedent could not return to his usual occupation during the months which followed and consequently convalesced from the date of his discharge from the hospital until March, 1967 when he was placed on light duty at the Washington Terminal Company. During the periods of convel-- esance; plaintiff's decedent was required to return to the outpatient clinic at the Rogers Memorial Hospital and did continue to keep such appointments up to March, 1967. Plaintiff's decedent became patently ill on April 15, 1967 but continued to work. On April 21, 1967, plaintiff's decdent died suddenly and was pronounced D. O. A. at the Providence Hospital.

According to the hospital reports maintained by the Defendant, plaintiff decedent had undergone an Operation known as : (a) Appendectomy and (b) Cholecystectomy - performed on October 2, 1966.

At approximately 8 :30 A. M. the Coroner, Dr. James Whelton, examined the plaintiff's decedent 's body at the Emergency Room at Providence Hospital and confirmed the death. The body was transferred to the D. C. Morgue and again, some 3 1/2 hours later; Dr. Whelton again saw the body as an initial observation prior to preparation to perform an autopsy. The post mortem change in the body was such that the Coroner concluded that an autopsy could not be performed because of the following post mortem body changes - " A tremendous amount of distention of the abdomen, soft tissue of the face, scrotal sac and penis had developed. Large fluid containing blebs had developed over the body survace. Collections of gas were present throughout the tissue over the entire body from the scalp to the soles of the feet. Medically, it was concluded that the plaintiff's decedent had suffered from gas gangrene caused by a bacteria of the Clostridium family. That the most logicial cause of the infection was due to a rupture of an internal organ within the abdominal cavity since this organism intestinal tract. The fact that most of the pain had been in the lower left quadrant of the abdomen would seem to indicate that a diverticula of the colon had ruptured resulting in a peritonitis and blood stream spread of this organism to all portions of the body. "

The cause of action here is one pursued under the Survival Statute and that the Plaintiff's decedent became patently ill and physically incapacitated on or about April 15, 1967 and remaining in that condition until April 21, 1967 when he died.

S.A. 4 m

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MAYTRUDE JONES, Administratrix of Estate of Alexander L. Jones, Deceased
and
MAYTRUDE JONES

Plaintiffs

v.

ROGERS MEMORIAL HOSPITAL

Defendant

Civil Action No. 3467-69

ORDER

Upon consideration of the defendant's Rogers Memorial Hospital motion to dismiss, it is this ___ day of _____, 1970:

ORDERED, that the motion to dismiss be, and the same hereby is granted.

_____
JUDGE

A copy of the foregoing Order was mailed to Clement T. Cooper, Esquire, attorney for plaintiff, on the ___ day of May, 1970.

_____
Lawrence E. Carr, Jr.

F 2570 000 19 B 3467 69 A — 1 ... 5.00 J.A. # 5

S.R.O.

United States District Court for the District of Columbia

FILED 15 MAY 1970

ROBERT M. STEARNS
CLERK

MAYTRUDE JONES ET AL.
Plaintiff.

vs.

ROGERS MEMORIAL HOSPITAL
Defendant.

CIVIL NO. 3467-69

NOTICE OF APPEAL

Notice is hereby given this 15th day of May, 1970, that

Maytrude Jones, et al.

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of April, 1970

in favor of

against said

[signature]
Attorney for Plaintiff

918 F Street. N.W. (202)
Washington, D.C. 20004

5.A.

	ADMISSION DATE	DATE OF DISCHARGE	93887
		PHONE NO.	ARRIVAL TIME: AM PM

AGE	RACE	SEX F	MARITAL STATUS	SOC. SEC. NO.	IN PATIENT ☐	OUT PATIENT ☐	HOSPITAL NO. 774081-4	ROOM NO. 12

OCCUPATION	EMPLOYER ... Co	ADDRESS
COMPENSATION CASE	C.H.I. NO.	OTHER
DIVISION	DOCTOR	BROUGHT IN BY	RESPONSIBLE PARTY Anth Saned (IS)

HISTORY OF ACCIDENT (WHEN, WHERE, HOW) TIME: AM PM

DIAGNOSIS – TREATMENT

FINAL DISPOSITION

DOCTOR

BIRTH MO. DAY YEAR	BIRTHPLACE	NATIONALITY	HOW MANY YEARS IN CITY COUNTY STATE U.S.	CITIZEN OF WHAT COUNTRY
3/ /05	Delaware			

NAME OF HUSBAND OR MAIDEN NAME OF WIFE	ADDRESS IF OTHER THAN ABOVE		BIRTHPLACE
	Same		
NOTIFY IN CASE OF EMERGENCY	RELATIONSHIP	ADDRESS	PHONE
	Wife	Same	Same
NAME OF FATHER	BIRTHPLACE	MAIDEN NAME OF MOTHER	BIRTHPLACE
Unknown			
ATTENDING PHYSICIAN	DATE OF LAST ADMISSION	ADMISSION DATE	DISCHARGE DATE
Dr. Bruder /		10/ /66 5:40 PM	10/17/66 1 PM
VALUABLES CHECKED YES ☐ NO ☐	EVER IN MILITARY SERVICE YES ☐ NO ☐ BRANCH-	ADMITTED BY:	INFORMANT

INITIAL CHARGE

Provisional Diagnosis (to be completed within 24 hours after admission):

R/o acute appendicitis.

On admission, patient or qualified person must sign authorization for Medical and/or Surgical Treatment on reverse side.

	Code No.
Final Diagnosis: Cholelithiasis, Cholecystitis	687-100
Appendicitis	687-615
	6612-100
Secondary Diagnosis or Complications: None	
Operation: Appendectomy	661-12
Cholecystectomy / 10/2/66	677-12

Consultation With

Results: ☐ Recovered ☑ Improved ☐ Not Improved ☐ Not Treated ☐ Diagnosis Only ☐ Died

Cause of Death _______________ autopsy: ☐ Yes ☐ No

I have examined and approved this complete medical record on 10/17 1966

Signed J. M. Bruder M.D., Attending Physician

EASTERN DISPENSARY AND CASUALTY HOSPITAL

ORDER OF RECORDING

1. Date and time of examination
2. State of positive findings noted previously
3. New signs and symptoms
4. Complications
5. Changes of impressions or diagnosis
6. Record of treatment given
7. Results of treatment
8. Signature of physician making observations

Admission laboratory result showed normal
CBC & abn. urinalysis. Clinical symptoms
manifestation showed laparotomy
& it was found that he had acute
appendicitis & cholelithiasis c cholecystitis
Handling appendectomy & cholecystectomy
done. His post-op. course was une-
ventful & quite satisfactory. No
complications. Discharged improved.

[illegible signature]

Name—Last	First	Middle	Hospital No.

Location in Hospital	Clinic or Service	Attending Physician

PROGRESS NOTES

ORDER OF RECORDING

1. Date and time of examination
2. State of positive findings noted previously
3. New signs and symptoms
4. Complications
5. Changes of impressions or diagnosis
6. Record of treatment given
7. Results of treatment
8. Signature of physician making observations

1-10-66
Afebrile. Improving well & ambulant. Bowel sound & BP good. Heart & lungs OK.

[illegible signature]

10-12-66 - Site dry & clean. Sutures all removed. No drainage.

[illegible signature]

Gen. condition good. [illegible]

10-15-66 - Sleep satisfactory.

[illegible signature]

10-17-66 Discharge note:

Adm a 60 yr old male who claimed to have onset of abd pain 2 weeks PTA. Had earlier been admitted to another Hosp., worked up & subsequently discharged.

Patient was readmitted to this hospital because of RLQ pain

Name—Last	First	Middle	Hospital No.

Location in Hospital	Clinic or Service	Attending Physician

PROGRESS NOTES

Approved 1952 by the American Hospital Association

ORDER OF RECORDING

1. Date and time of examination
2. State of positive findings noted previously
3. New signs and symptoms
4. Complications
5. Changes of impressions or diagnosis
6. Record of treatment given
7. Results of treatment
8. Signature of physician making observations

10-2-66 - Had cholecystectomy & appendectomy.

10-3 Complains of abd. distention. Has bowel sounds. No flatus. I.V. fluids.

10-4-66 - Afebrile. No distention. Bowel sounds active. Non-tympanitic. On bouillon.

10-5-66 - Improving well. Afebrile. Passing out flatus. Path report reveals chr. cholecystitis c acute exacerbation & peri-appendicitis acute.

10-7-66 Improving. Cut looks clean & dry. Afebrile.

10-8-66 - Afebrile. Improving. No abd. distention.

Name—Last	First	Middle	Hospital No.
[illegible]	ALEXANDER		

Location in Hospital	Clinic or Service	Attending Physician
234		[illegible]

PROGRESS NOTES

Approved 1950 by the American Hospital Association

ORDER OF RECORDING

1. Date and time of examination
2. State of positive findings noted previously
3. New signs and symptoms
4. Complications
5. Changes of impressions or diagnosis
6. Record of treatment given
7. Results of treatment
8. Signature of physician making observations

10/1 [illegible] - Patient had right lower quadrant pain: without relation to food intake since yesterday. no nausea, no vomiting no urinary [illegible] B.M. - [illegible] seen in symptoms. Freedmans Hosp: but was sent home - Have similar symptoms [illegible] right abdominal pain P.E. afebrile. Heart & lungs - clear. regular [illegible]. abdomen - [illegible] tenderness right lower quadrant. Impression appendicitis R/O mesenteric adenitis.

[illegible] [signature]

CBC results -
WBC - 4300. [illegible]
Hb. 13.9. 1 Baso.
Hct. 38 %. 60 Seg
34 lymphocytes.

[signature]

Name—Last	First	Middle	Hospital No.
Location in Hospital	Clinic or Service	Attending Physician [signature]	

PROGRESS NOTES

JONES ALEXANDER 60 774081-4
[illegible] 66 BRADEN PROT CM 23:/2

ORDER OF RECORDING

1. Date and time of examination
2. State of positive findings noted previously
3. New signs and symptoms
4. Complications
5. Changes of impressions or diagnosis
6. Record of treatment given
7. Results of treatment
8. Signature of physician making observations

Admission note

60 year old started to have RLQ 26 hours pta., continuous, no radiation. There were no attending signs and symptoms.

Hx of previous [illegible] negative. no allergy or surgery. Physical exam showed a temp of 98° °F. Heart and lungs clear. Abdomen soft, mild tender in RLQ, positive Rovsing.

Imp. acute appendicitis R/O mesenteric adenitis.

[signature]

Name—Last	First	Middle	Hospital No.
Location in Hospital	Clinic or Service		Attending Physician

JAMES ALEXANDER 60 774081-4
10 1 66 BRADEN PROGRESS NOTES

PROVIDENCE HOSPITAL
150 VARNUM STREET N.E.
WASHINGTON, D. C. 20017

HIS. NUMBER: 5A587

PATIENT

LAST NAME	FIRST	MIDDLE	HOSPITALIZATION NO.	BIRTH DATE	DATE IN	TIME IN
Jones	Alexander			3/4/	4/21/67	7:49 AM

STREET ADDRESS	INSURANCE	AGE	RACE	SEX	MARITAL STATUS	RELIGION
6703 Sandy Spring		61	N	M	M	P

CITY	ZONE	STATE	RELATIONSHIP TO CERTIFICATE HOLDER	TELEPHONE	DATE OUT	TIME OUT
		Rd, N.W.	Self	726-2624		

EMPLOYER

EMPLOYER'S NAME	EMPLOYEE'S OCCUPATION	WORKMEN'S COMPENSATION CASE? YES / NO	SEND BILL TO: CO. NAME
Wash Term	Trackman		

BUSINESS ADDRESS	TELEPHONE	FULL NAME OF ATTENDING PHYSICIAN	ADDRESS
		Brady at Casualty Hosp	

CITY	ZONE	STATE	SOCIAL SECURITY NO.	CITY	STATE

RESPONSIBLE PARTY

LAST NAME	FIRST	MIDDLE	RELATIONSHIP TO PATIENT
Self			Self

ADDRESS:

TELEPHONE:

DATE OF ACCIDENT	TIME OF ACCIDENT	PLACE WHERE ACCIDENT OCCURRED	BROUGHT IN BY
4/20/67		Home	Amb-4

DESCRIPTION OF ACCIDENT
Had pain in (L) side last night & this morning.
D.O.A.

ALLERGIC HISTORY YES ☐ NO ☐ TETANUS YES ☐ NO ☐ TAT YES ☐ NO ☐

DESCRIPTION OF TREATMENT RENDERED.

SEE REVERSE SIDE

PERMISSION IS HEREBY GRANTED TO AUTHORITIES OF HOSPITAL FOR SUCH PROCEDURES AS MAY BE NECESSARY IN THE CASE OF THE ABOVE NAMED PATIENT.

SIGNED WITNESSED.

RELATIONSHIP

STATISTICS

FREQUENCY: (CHECK ONE)
☐ OLD
☐ NEW

STATUS: (CHECK ONE)
☐ CASH
☐ CHARGE
☐ INSURANCE
☐ WORKMEN'S COMP.
☐ BLUE CROSS
☐ WELFARE
☐ OTHER

DISPOSITION: (CHECK ONE)
☐ ADMIT TO HOSPITAL
☐ REFERRED TO L.M.D.
☐ RETURNED TO DC Morgue CLINIC
☐ TRANSFERRED TO CLINIC

SERVICE: (CHECK ONE)
☐ SURGICAL
☐ MEDICAL
☐ PEDIATRIC
☐ ORTHOPEDIC
☐ GYNECOLOGY
☐ OBSTETRICAL

SHIFT: (CHECK ONE)
☐ DAY
☐ EVENING
☐ NIGHT

OTHER
☐ RESPIRATION CEASED
☐ POLICE
☐ NON-EMERGENCY

Seen by Priest
21 Apr 67
Fr Andrew Mulenan

EMERGENCY ROOM VISIT

LABORATORY

SUTURES

MEDICATIONS

X-RAY

Pronounced DOA @ 7^52 by
Dr. Rabkuswamy

TOTAL CHARGES: DOA
CASH PAID: Att. Mr.
BALANCE: Quinn

CASHIER'S SIGNATURE

131384

DATE TIME

DOCTOR'S SIGNATURE MEDICAL RECORD NURSE'S SIGNATURE S. Callahan RN SIGNATURE OF POLICE

EMERGENCY DEPARTMENT

E_____

TETANUS IMMUNIZATION_____ DATE OF TETANUS BOOSTER_____

TIME	NURSE'S NOTES	DOCTOR'S NOTES
	Clothing sent to Morgue & body	DIAGNOSIS
	No rings or valuables.	
		PHYSICAL EXAMINATION AND TREATMENT
		Ivan called stork. The Pt was brought to E.R at 7:49 A.M. The Pt was dead - as I could not feel the Pulse. No Heart sounds No Respirations and pupils dilated and non-reactive to light.
		D.O.A.
		The ambulance people told Her Could not feel the pulse when they picked him up in his Home - 15 min last.
		[signature]

ACADEMIC HOSPITAL

J.A. #8

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE CORONER
19TH AND E STREETS, S. E.
WASHINGTON, D. C. 20003

June 27, 1967

Mr. John G. Saul
Attorney and Counsellor at Law
412 5th Street, N.W.
Washington, D.C. 20001

RE: JONES, Alexander L.
Case No. 34-827

Dear Mr. Saul:

Investigation of the death of the above-named included a police report indicating that the deceased became unconscious in his home at approximately 6:15 AM on the date of death, April 21, 1967, after complaining of feeling ill to his wife. He was transported to Providence Hospital and was pronounced dead on arrival in the emergency room at 7:52 AM April 21, 1967.

History revealed that the deceased had undergone surgery for gallbladder trouble and appendix in October of 1966. He had remained off work until March of 1967 and was working light duty until April 14, 1967 at which time he was complaining of severe stomach and chest pain. He remained at home the night before complaining that the pain was still bothering him. The night prior to his death he complained of stomach and lower chest pain but he did not consult a physician during this time. There was no history of any injury involved. It so happened that I was present in the emergency room of Providence Hospital at approximately 8:30 AM April 21st and viewed this body at that time. I was told by the physician on duty, Dr. Pabwaswamy, that there was no sign of life upon his arrival in the emergency room and the persons accompanying the deceased to the hospital stated that he had complained of abdominal pain for approximately a week -- most of the pain being in the lower left quadrant. I next viewed the body of Mr. Jones here in the Coroner's Office, and I was amazed to find the tremendous change which had taken place in the remains of this deceased in the 3 1/2 hour period since I had viewed the body in the emergency room of Providence. A tremendous amount of distention of the abdomen, soft tissue of the face, scrotal sac and penis had developed. Large fluid containing blebs had developed over the body surface which were not present when I first saw this body. Collections of gas were present throughout the tissue over the entire body from the scalp to the soles of the feet. This is referred to as subcutaneous emphysema. The logical explanation for these

changes was that this man was suffering from gas gangrene caused by a bacteria of the Clostridium family. The body was not opened. Full autopsy was not performed because this organism is highly resistant to removal and we had fear of contaminating our autopsy room and body storage area so that this organism would live in a dormant state for a matter of months despite all usual cleansing procedures. The bacteriologist from D. C. General Hospital was asked to come over and bacteriologic cultures were made from the fluid of the blisters which had formed over the body surface. The diagnosis of gas gangrene infection was confirmed because the culture report from D. C. General Hospital was Clostridium perfringens. The most logical cause of this infection in this individual was a rupture of an internal organ within the abdominal cavity since this organism lives in the human intestinal tract. The fact that most of the pain had been in the lower left quadrant of the abdomen would seem to indicate that a diverticula of the colon had ruptured resulting in a peritonitis and blood stream spread of this organism to all portions of the body. I have discussed this case with several bacteriologists and several pathologists and they uniformly agree that this infection could not be attributed to the surgical procedure done in October 1966.

It would be my general recommendation that you obtain a medical consultant regarding the details of this case and I would be more than willing to discuss the scientific aspects of the case with any physician of your choosing. Hoping that this will clarify understandable confusion regarding the death of Alexander L. Jones, I remain

Yours sincerely,

Richard L. Whelton

RICHARD L. WHELTON, M.D.
CORONER

W/lp

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC HEALTH

CERTIFICATE OF DEATH

1967 MAY 24 PM 3 11

State No. File No. 67 3205

1. NAME OF DECEASED (Type or Print): First ALEXANDER Middle L. Last JONES

2a. DATE OF DEATH: Month 4 Day 21 Year 1967

2b. Hour of Death 7:52 AM

3. SEX

4. COLOR OR RACE: COLORED

5. Never Married, Married, Widowed, Divorced: Specify: MARRIED

6. DATE OF BIRTH: 3-4-1906

7. AGE (In years last birthday): 61

If Under 1 Yr. Months / Days

If Under 24 Hrs. Hours / Min.

8a. PLACE OF DEATH: Washington, D. C.

NAME OF HOSPITAL, NURSING HOME OR OTHER INSTITUTION (If not in institution, give street address): (DOA) PROVIDENCE HOSPITAL

9. USUAL RESIDENCE (Where deceased lived. If institution, residence before admission)

a. STATE: D.C.

b. COUNTY

c. CITY: WASHINGTON

e. INSIDE CITY LIMITS (SPECIFY YES OR NO): YES

d. STREET ADDRESS (If rural, give location): 6703 SANDY SPRING Rd.

10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired)

10b. KIND OF BUSINESS OR INDUSTRY: WASH. TERMINAL

11. BIRTHPLACE (State or foreign country): DELAWARE

12. CITIZEN OF WHAT COUNTRY? USA

13a. FATHER'S NAME: Unknown

13b. MOTHER'S MAIDEN NAME: Unknown

14. NAME OF SURVIVING SPOUSE: MAYTRUDE JONES

15. Was he in U.S. Armed Forces?

16. SOCIAL SECURITY NO.

17a. INFORMANT RELATIONSHIP TO DECEASED: MAYTRUDE JONES WIFE

17b. ADDRESS Street City State: 6703 Sandy Spring Rd. N. W.

18. CAUSE OF DEATH. (Enter only one cause per line for (a), (b), and (c).)

PART I. DEATH WAS CAUSED BY:

IMMEDIATE CAUSE (a): [illegible]

Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.

DUE TO (b): 0

DUE TO (c):

Interval Between Onset and Death:

PART II. OTHER SIGNIFICANT CONDITIONS: contributing to death but not related to the terminal disease condition given in part I(a)

19a. AUTOPSY? YES OR NO: YES

19b. If Yes, Were Findings Considered in Determining Cause of Death?

IF OPERATION WAS PERFORMED COMPLETE ITEMS 20a and 20b

20a. DATE OF OPERATION

20b. CONDITION FOR WHICH OPERATION WAS PERFORMED

21a. Specify if accident, suicide, homicide, or manner undetermined

21b. HOUR AND DATE OF INJURY: Month, Day, Year: M

21c. DESCRIBE HOW INJURY OCCURRED (Enter nature of Injury in Part I or Part II)

21d. INJURY AT WORK? (Specify Yes or No)

21e. PLACE OF INJURY: (At Home, Farm, Factory, Street or Office Building, Etc.)

21f. LOCATION CITY COUNTY STATE

22. I certify that (I) (this hospital) attended the deceased from _____, 19____ to _____, 19____, that (I) (we) last saw the deceased alive on _____, 19____, and that death occurred from the causes and on the date and hour stated above.

22a. SIGNATURE: [signature] ATTENDING PHYS. ☑ MEDICAL DIRECTOR ☐ STAFF PHYS. ☐

22b. DATE SIGNED: 4/24/67

22c. PHYSICIAN'S NAME (Type): L. Rinfret

22d. Address: D. C. CORONER'S OFFICE

23a. BURIAL ☒ CREMATION ☐ REMOVAL ☐

23b. DATE: 4-25-67

23c. NAME OF CEMETERY OR CREMATORY: Harmony Memorial Park

23d. LOCATION (City, town, or county) (State): Prince George County Maryland

24a. FUNERAL HOME: John E. Milnes. ADDRESS: 3015 - 12th Street., N. E.

24b. UNDERTAKER'S SIGNATURE: [signature]

24c. UNDERTAKER'S REGISTRATION NUMBER: 577

REMARKS: To Be Completed (OVER)

Date Issued May 10,1967

NOT VALID WITHOUT RAISED SEAL

THIS IS TO CERTIFY that the above is a true and correct reproduction of the original certificate filed with the Vital Records Unit of the District of Columbia Department of Public Health.

[signature]

John H. Crandall, Chief
Vital Records Unit

DELAYED REPORT OF DIAGNOSIS

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC HEALTH

FILE No. 67 3205

1. NAME OF DECEASED (Type or Print) — First / Middle / Last	2a. DATE OF DEATH — Month / Day / Year	3. SEX
ALEXANDER L. JONES	4 21 1967	male

18. CAUSE OF DEATH: (Enter only one cause per line for (a), (b), and (c).)
PART I. DEATH WAS CAUSED BY:
IMMEDIATE CAUSE (a) Gas Gangrene
Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.
DUE TO (b)
DUE TO (c)
Interval Between Onset and Death:

PART II. OTHER SIGNIFICANT CONDITIONS contributing to death but not related to the terminal condition given in part I(a)

19a. AUTOPSY? YES OR NO

19b. If Yes, Were Findings Considered in Determining Cause of Death?

IF OPERATION WAS PERFORMED COMPLETE ITEMS 20a and 20b

20a. DATE OF OPERATION

20b. CONDITION FOR WHICH OPERATION WAS PERFORMED

21a. Specify if accident, suicide, homicide, or manner undetermined

21b. HOUR AND DATE OF INJURY: Month, Day, Year, M

21c. DESCRIBE HOW INJURY OCCURRED (Enter nature of Injury in Part I or Part II)

21d. INJURY AT WORK: (Specify Yes or No)

21e. PLACE OF INJURY: (at Home, Farm, Factory, Street or Office Building, Etc.)

21f. LOCATION CITY COUNTY STATE

22. I HEREBY CERTIFY THAT DECEASED DIED FROM THE CAUSE STATE ABOVE. THE COMPLETE CAUSE OF DEATH COULD NOT BE DETERMINED WITHIN 72 HOURS AFTER DEATH AND ENTERED ON THE CERTIFICATE OF DEATH FOR THE FOLLOWING REASON:

clostridia perfringens - awaiting culture from bubbles - site of origin undetermined.

[signature] 5/3/67

SIGNATURE DATE

AMENDMENT TO ORIGINAL CERTIFICATE

THIS IS TO CERTIFY that the above is a true and correct reproduction of the document amending the original certificate filed with the Vital Records Unit of the District of Columbia Department of Public Health.

John H. Crandall
John H. Crandall, Chief
Vital Records Unit

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24373

MAYTRUDE JONES, as Administratrix of the ESTATE OF ALEXANDER L. JONES, Deceased, and MAYTRUDE JONES, individually, *Appellant*,

v.

ROGERS MEMORIAL HOSPITAL, *Appellee*.

Appeal from the United States District Court for the District of Columbia

---

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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TABLE OF AUTHORITIES

* Cases chiefly relied upon are marked with an asterisk.

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MAYTRUDE JONES, as Administratrix of the ESTATE OF ALEXANDER L. JONES, Deceased, and MAYTRUDE JONES, individually, *Appellant,*

v.

ROGERS MEMORIAL HOSPITAL, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

STATEMENT OF ISSUE PRESENTED

Whether the District Court properly dismissed Appellant's claim as barred by the statute of limitations.*

---

* This case has not previously been before this Court.

REFERENCES TO RULINGS

Reference is made to the ruling of the District Court, entered on the Court Clerk's Memorandum, on April 22, 1970, dismissing plaintiff's complaint "on its face." R. before page 1.*

COUNTERSTATEMENT OF THE CASE

Proceedings Below

Appellant, Maytrude Jones, hereafter simply "plaintiff," instituted this action, both in her capacity as administratrix and as an individual, against appellee, Rogers Memorial Hospital, and an unnamed individual defendant on December 8, 1969.[1] Her complaint, in two counts, is allegedly brought under the District of Columbia survival of actions statute, D. C. CODE § 12-101 (1967 ed.). In it she seeks damages due to the two defendants' alleged negligent performance of an operation upon her husband, Alexander L. Jones, on some unspecified date in October, 1966. That negligence is further alleged to have been the direct result of her husband's death on April 21, 1967. Among the listed items of damage for which she seeks compensation are loss of the "substantial estate" which her husband "would have, in the future accumulated" had he not died; funeral expenses; some $15,000 in medical expenses incurred "between the time of his injury and the date of his death;" loss of support totaling approxi-

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* References "R." are to the record on appeal. Plaintiff's "Joint Appendix" was not prepared jointly as required by FEDERAL RULE OF APPELLATE PROCEDURE 30. Because of certain differences between original documents in the record and those in the "Joint Appendix," as well as the failure to include items which should be considered, Appellee deems it advisable to refer directly to the record.

1 The complaint included in plaintiff's "Joint Appendix," at J.A. #1, has been edited to delete all reference to the unnamed individual defendant. In addition, certain changes in the wording of paragraph 5 of the original complaint have been effected and the document has been retyped. Hereafter appellee's references to the wording of the complaint shall be to the wording of the original, as found in the Record at page 1.

mately $30,000; and, apparently, her husband's pain and suffering while he was "incapacitated for seven months [from the time of the operation] up to the time of his death." R. 1.

Contrary to plaintiff's assertion, Brief for Appellant 2, Rogers Memorial Hospital, hereafter "defendant," filed no answer but rather timely moved to dismiss her complaint for failure to state a claim upon which relief could be granted in that it is barred by the applicable statute of limitations. R. 3.

The individual defendant remains unnamed and unserved with process and has filed no appearance.

The United States District Court for the District of Columbia, per Judge McGuire, granted defendant's motion and dismissed plaintiff's complaint, "on its face," on April 22, 1970. R. Court Memorandum, 7.

Plaintiff elected to stand upon her complaint and timely filed notice of appeal. R. 8.

Statement of the Facts

Despite plaintiff's attempt to cure the defects in her complaint by the inclusion, in her brief, of many factual allegations *dehors* the record, the District Court was bound to consider, in the light most favorable to plaintiff, *only* such allegations of fact as were to be found in her complaint. The operative allegations of plaintiff's complaint, allegedly giving rise to plaintiff's claim for relief, are as follows:

> 4. In October, 1966 . . . plaintiff [sic] was admitted as a paying patient [of defendant] for purpose [sic] of undergoing surgery for gallbladder and appendix trouble.
>
> 5. On or about October, 1966 . . . as a direct result of the negligence of the defendant . . . and during the

course of said surgery, and the periods which followed thereafter, plaintiff's decedent was caused to suffer great pain, agony and infection and further, that during the course of said surgery and due to the negligence of the defendant . . . plaintiff [sic] was caused to suffer from rupture of an internal organ within the abdominal cavity, to with [sic], the diverticula of the colon which subsequently caused gas gangrene from which plaintiff's decedent met his death on April 21, 1967.

6. As a result of the negligence of the defendants, plaintiff was caused to suffer, excruciating body pains, and agony and was incapacitated for seven months up to the date of his death.

Feeling itself bound, as was the District Court, to the factual allegations of plaintiff's complaint for the purpose of testing its sufficiency, defendant has made no attempt to supplement the record on appeal. However, if the Court deems itself required to consider factual allegations outside the record in determining this appeal, defendant respectfully requests leave to supplement the record with an appropriate memorandum, in the interest of doing substantial justice.

SUMMARY OF ARGUMENT

Plaintiff's complaint, filed December 8, 1969, alleges negligent performance of surgery upon her husband in October, 1966, and his death, as a result of that negligence, on April 21, 1967. Under the applicable law, plaintiff's right of action under the survival statute accrued, if at all, on the date that the alleged negligence matured into an actual injury to her husband. It appears affirmatively from the complaint that plaintiff's husband suffered actual injury on or about the date of the surgery, October, 1966. Accordingly, plaintiff's complaint was not timely filed and the District Court correctly dismissed it "on its face."

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT "ON ITS FACE" AS BARRED BY THE STATUTE OF LIMITATIONS.

A. The Right of Action Alleged Here Accrued, If at All, When Defendant's Negligence Resulted in an Actual Injury to Plaintiff's Husband.

In this action, filed December 8, 1969, plaintiff seeks damages for defendant's alleged negligence and medical malpractice during surgery in October, 1966, which caused the death of her husband on April 21, 1967. Plaintiff's right of action for the wrongful death of her husband being barred by the one-year limitation on death actions, D.C. CODE § 16-2702 (1967 ed.), she seeks recovery under the survival of actions statute.

The survival statute reads, in pertinent part:

> On the death of a person in whose favor . . . a right of action has accrued . . . the right survives . . . in favor of the legal representative of the deceased. . . .

D.C. CODE § 12-101 (1967 ed.). The statute, by its terms, creates no new right of action. It merely has the effect of extending the quality of survival to rights of action which had previously abated on the death of the injured party. *Thomas* v. *Doyle,* 88 U.S. App. D.C. 95, 187 F.2d 207 (1950).

Because the statute creates no new right the statute of limitations in survival actions commences running when the right of action first accrues to the deceased. *Cf., Cullen* v. *District of Columbia,* 221 A.2d 914 (D.C. App. 1966). Under the statute of limitations applicable here plaintiff must have commenced this action within three years of the date on which the alleged right of action first accrued to her husband. D.C. CODE § 12-301 (8) (1967 ed.). In addition, because the survival statute has no application where the right of action did not accrue prior to the death

of the injured party, *see, Bennett* v. *Bennett,* 83 F. Supp. 19 (D.D.C. 1949), the alleged right of action must have accrued to plaintiff's husband prior to his death.

The initial question presented on this appeal is when did the alleged right of action accrue to plaintiff's husband?

This Court has adopted the liberal "maturation of damages" rule for the determination, for limitations purposes, of the time of accrual of rights of action. Under this rule an action sounding in negligence accrues when the injury complained of actually results from the negligence alleged. *Hanna* v. *Fletcher,* 97 U.S. App. D.C. 310, 231 F.2d 469, *cert. denied, sub nom. Gichner Iron Works, Inc.* v. *Hanna,* 351 U.S. 989 (1956).

In *Hanna,* the plaintiff's injury resulted from an act of negligence committed seven years prior to the accident. Reversing the District Court's entry of judgment for defendants, this Court agreed with plaintiff's contention that the right of action did not accrue until the accident resulting in her injuries, noting that

> The Code is controlling. The action against [defendant] is based on negligence, sounds in tort, and did not accrue until injury resulted from the alleged negligence.

Hanna v. *Fletcher, supra,* 97 U.S. App. D.C. at 313, 231 F.2d at 472.

In *Fort Myers Seafood Packers, Inc.* v. *Steptoe and Johnson,* 127 U.S. App. D.C. 93, 381 F.2d 261 (1967), *cert. denied,* 390 U.S. 946 (1968), this Court applied the *Hanna* rule to cases of professional malpractice. In that action, a suit against attorneys for malpractice, the District Court adopted a special rule, used in other jurisdictions, for the determination of when the time began to run against a claim for malpractice. Under that rule the statute begins to run in malpractice cases at the moment when the defendant does the act that afterwards

results in injury. *Fort Myers Seafood Packers, Inc.* v. *Steptoe and Johnson,* 353 F. Supp. 626, 628 (D.D.C. 1966). Rejecting the "special rule" this Court said

> the . . . statute requires actions to be brought within three years 'from the time the right to maintain the action accrues' . . . . In ordinary negligence actions this means the time when the plaintiff suffers injury . . . . Several states have adopted a special rule . . . . [T]he District Court chose the special rule. We see no reason for drawing such a distinction between malpractice suits and other actions. . . . Since this action was filed within three years [of the injury], we think it was timely.

Fort Myers Seafood Packers, Inc. v. *Steptoe and Johnson, supra,* 127 U.S. App. D.C. at 94, 381 F.2d at 264.

Plaintiff's brief urges, in the alternative, the adoption of either the "discovery" theory or the "physician-patient relationship" theory as the standard for determining when the statute of limitations begins to run in malpractice cases.[2] However commendable these theories may be, their adoption here is inappropriate because plaintiff's complaint is utterly devoid of any factual allegations upon which their applicability might be predicated.

Further, the sole District of Columbia case applying the discovery theory, *Burke* v. *Washington Hospital Center,* 293 F. Supp. 1328 (D.D.C. 1968), is clearly distinguishable from this case on its facts.

Thus, defendant submits that the statute of limitations commenced running at the moment when defendant's

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[2] Under the discovery theory the statute does not begin to run in malpractice claims until the injured party knew, or through the exercise of reasonable diligence should have known, of the facts giving rise to his claim. *See, e.g., Quinton* v. *United States,* 304 F.2d 234 (5th Cir. 1962). Under the physician-patient relationship theory the statute commences running upon termination of the physician-patient relationship as to the particular condition during which the negligent acts are alleged to have occurred. *See, e.g., Brown* v. *United States,* 353 F.2d 578 (9th Cir. 1965).

alleged negligence was consummated and injury resulted to plaintiff's husband. Reviewing the factual allegations of plaintiff's complaint it is clear that a right of action accrued to plaintiff's husband in October, 1966.

B. On the Face of Plaintiff's Complaint Defendant's Alleged Negligence Resulted in Actual Injury to Her Husband in October, 1966.

Construing plaintiff's complaint so as to do substantial justice, *Francis O. Day Co.* v. *Shapiro,* 105 U.S. App. D.C. 392, 267 F.2d 669 (1959), and viewing its factual allegations in the light most favorable to plaintiff, *e.g., Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.,* 153 F. Supp. 589 (D.C. N.J. 1957), *affirmed,* 307 F.2d 210 (3rd Cir. 1962), *cert. denied,* 372 U.S. 929 (1963), it is clear that plaintiff's husband had a right of action in October, 1966, and that plaintiff's claim is therefore barred by the three-year statute of limitations.

In plaintiff's complaint, filed on December 8, 1969, she clearly alleges that defendant was negligent in performing surgery on her husband "On or about October, 1966 . . . during the course of [which] . . . [he] was caused to suffer from rupture . . . of the colon . . . from which [he] met his death on April 21, 1967," and further, that "as a result of the negligence of defendants [during the operation] [her husband] was caused to suffer, excruciating pains . . . and was incapacitated for seven months up to the date of his death." Complaint, paragraphs 5-6, R. 1. Taking plaintiff's allegations at face value and giving them their plain meaning, it clearly appears that her husband sustained an injury during the October, 1966, surgery which rendered him incapacitated for seven months and ultimately resulted in his death on April 21, 1967.

These allegations potentially gave plaintiff two rights of action: the first for negligence in causing her husband's

death under the Wrongful Death Act, D.C. CODE § 16-2701 *et seq.* (1967 ed.), and the other for his personal injuries under the survival statute, D.C. CODE § 12-101 (1967 ed.). In the District of Columbia negligent conduct resulting in death may generate simultaneously two separate and distinct bases for action, one under the survival statute and the other under the Wrongful Death Act. *Emmett* v. *Eastern Dispensary and Casualty Hospital,* 130 U.S. App. D.C. 50, 396 F.2d 931 (1967); *Sornborger* v. *District Dental Laboratory,* 105 U.S. App. D.C. 290, 266 F.2d 694 (1959). The actions are governed by different statutes for limitations purposes and the tolling of the statute on one action has no effect on the other. *Cf., Hudson* v. *Lazarus,* 95 U.S. App. D.C. 16, 217 F.2d 344 (1954); *Wharton* v. *Jones,* 285 F. Supp. 634 (D.D.C. 1968).

It is apparent from the face of the complaint that the statute of limitations on plaintiff's wrongful death claim has expired. Thus she is left with no right of recovery for any negligence causing his death. *Lewis* v. *Reconstruction Finance Corp.,* 85 U.S. App. D.C. 339, 340, 177 F.2d 654 (1949); *Hartford Accident & Indemnity Co.* v. *Eastern Air Lines,* 155 F. Supp. 263 (S.D.N.Y. 1957) (construing District of Columbia statute). Her only right of recovery if any, is for injuries which must have matured prior to her husband's death in order that the right of action in his favor which "accrued for any cause prior to his death . . . [could survive] in favor of his legal representative . . . ." D.C. CODE § 12-101 (1967 ed.).

On the face of plaintiff's complaint those injuries accrued and matured at sometime (no date is specified) during the month of October, 1966, the statute of limitations began to run at the time of that injury, and plaintiff's claim, not filed until December 9, 1969, is barred by the three-year statute of limitations.

CONCLUSION

Appellee submits the District Court properly dismissed appellant's complaint and prays the decision be affirmed.

Respectfully submitted,

LAWRENCE E. CARR, JR.
Counsel for Appellee

ADDENDUM

I. D.C. Code Section 12-101 (1967 ed.):

Survival of rights of action

On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased. In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom. (Dec. 23, 1963, 77 Stat. 509, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

II. D.C. Code Section 12-301 (1967 ed.):

Limitation of time for bringing actions

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments—15 years;

(2) for the recovery of personal property or damages for its unlawful detention—3 years;

(3) for the recovery of damages for an injury to real or personal property—3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;

(5) for a statutory penalty or forfeiture—1 year;

(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;

(7) on a simple contract, express or implied—3 years;

(8) for which a limitation is not otherwise specially prescribed—3 years.

This section does not apply to actions for breach or contracts for sale governed by § 28:2-725. (Dec. 23, 1963, 77 Stat. 510, Pub. L. 88-241, § 1, eff. Jan. 1, 1964; Aug. 30, 1964, 78 Stat. 677, Pub. L. 88-509, § 2.)

III. D.C. Code Section 16-2701 (1967 ed.):

Liability; damages; prior recovery as precluding action

When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is a married woman, entitle her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, nothwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.

The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. Where there is a surviving spouse, the jury shall allocate the portion of its verdict payable to the spouse and next of kin, respectively, according to the finding of damage to the spouse and next of kin. If, in a particular case, the verdict is deemed excessive the trial judge or the United States Court of Appeals for the District of Columbia Circuit, on appeal of the cause, may order a reduction of the verdict. An action may not be maintained pursuant to this chapter if the party injured by the wrongful act, neglect, or default has recovered damages therefor during his life. (Dec. 23, 1963, 77 Stat. 596, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

IV. D.C. Code Section 16-2702 (1967 ed.):

Party plaintiff; statute of limitations

An action pursuant to this chapter shall be brought by and in the name of the personal representative of the deceased person, and within one year after the death of the person injured. (Dec. 23, 1963, 77 Stat. 596, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)